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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, )  
Plaintiff, )  
vs. ) Case No. V1300CR20108-0049  
JAMES ARTHUR RAY, )  
Defendant. )

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE WARREN R. DARROW  
ORAL ARGUMENT/EVIDENTIARY HEARING  
RE PENDING MOTIONS, DAY THREE  
NOVEMBER 16, 2010  
Camp Verde, Arizona

(Partial transcript)

(Discussion on disclosure of expert witness notes)

REPORTED BY  
MINA G. HUNT  
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Proceedings had before the Honorable  
WARREN R. DARROW, Judge, taken on Tuesday,  
November 16, 2010, at Yavapai County Superior Court,  
Division Pro Tem B, 2840 North Commonwealth Drive,  
Camp Verde, Arizona, before Mina G. Hunt, Certified  
Reporter within and for the State of Arizona.

2011 DEC 30 AM 11:25  
Stephanie Kling

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PROCEEDINGS

(The following is a partial transcript --

discussion on disclosure of expert witness notes.)

THE COURT: Okay. I'll address that for each  
motion.

I just want to say I want to be ready to  
move ahead and decide these things when they come  
up.

The juror questionnaires -- the other  
thing I wanted to bring up is the issue that I asked  
for argument on. The parties had briefed it  
comprehensively. But I asked for oral argument.  
That had to do with obtaining notes of interviews  
with experts. I'm going to phrase it in that  
fashion.

And I had spent some time writing a ruling  
and tried to reconcile the disclosure rules. And  
it's difficult. And I said this during the  
telephonic argument. There really are valid  
competing interests here.

My conclusion is that in dealing with  
experts -- and I still choose to write something out  
on it, and I will do that. But in working with  
experts I don't think either side wants to be in a  
situation where in those initial discussions with

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1 expert witnesses, it's at a point where what the  
2 expert is saying constitutes a discoverable  
3 statement. I just don't think that the disclosure  
4 rules contemplate that.

5 And the issue is really confined. No one  
6 was suggesting that -- the defense had not suggested  
7 that this applies to other, if we call them fact  
8 witnesses or lay witnesses. And I don't know.

9 Mr. Li, whoever wants to address that.  
10 Ms. Do has done that.

11 It's really confined just to the expert  
12 witness at this time, isn't it?

13 MS. DO: Yes. And I would argue that it's  
14 confined to an even more limited issue here, Your  
15 Honor. It was never the defense position that any  
16 notes that contained the initial statements during  
17 consultation with an expert is discoverable.

18 I think it's important to remember the  
19 context in which we received notice that the state  
20 was going to call this witness, Rick Ross. Rick  
21 Ross was going to actually testify, I think, within  
22 17 days.

23 THE COURT: Right. But I was writing the  
24 ruling. I dealt with the fact there appeared to be  
25 a major change in circumstances from when that first

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1 came about and then when we got around to arguing  
2 it. So I do understand that distinction.

3 So right now are you still seeking  
4 something?

5 MS. DO: We are, Your Honor. And what I was  
6 trying to get at is that it's an even more limited  
7 issue. We have an expert here for whom we have no  
8 idea what his testimony or his statement is going to  
9 be other than a five-word sentence that he's going  
10 to testify to group behavior.

11 And as the Court had just indicated a  
12 moment ago, it's inherently unfair to allow the  
13 state -- let me restate that. It's inherently  
14 unfair to expect the defense to be able to go in and  
15 conduct a meaningful interview of any witness, and  
16 in particular an expert witness, without any idea of  
17 what he has said previously regarding the proper  
18 testimony. I mean, essentially, the party would be  
19 stumbling in the dark.

20 And that's what we're asking for. The  
21 state can circumvent this issue by having this  
22 expert, I think according to standard protocol,  
23 write a report or provide his notes. And they've  
24 indicated they don't want that done. So we're  
25 asking for some discovery so we can conduct a

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1 meaningful interview.

2 THE COURT: I'm glad I brought this up because  
3 you really answered something I wasn't completely  
4 clear on before.

5 Ms. Polk, you indicated you were concerned  
6 about chilling of the state's investigation and  
7 talking to witnesses if you're going to have to turn  
8 over notes. You mentioned that that was a concern  
9 of yours.

10 And we're only talking about experts. I  
11 don't think those notes in consultation -- notes  
12 that are made of consultations have to be turned  
13 over, I don't think, if that's the case. But as  
14 Ms. Do points out, we're now within three months of  
15 trial. And the defense certainly needs to have a  
16 comprehensive report of what the expert is going to  
17 say or is anticipated to be his testimony.

18 When is that going to happen?

19 MS. POLK: Your Honor, the -- couple things.  
20 First of all, this is the same situation that the  
21 state is in with respect to the defense expert.  
22 They noticed this medical examiner from New Mexico.  
23 I've requested the opportunity to interview him.  
24 They have told me he's not ready to be interviewed,  
25 and they haven't produced any report. I don't know

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1 if they're going to or not.

2 With respect to Rick Ross, the decision  
3 has not been made whether or not Rick Ross will  
4 provide a report. He -- he's in the process of  
5 receiving information to review. And then after  
6 he's reviewed it, whether he produces a report or  
7 not remains to be seen.

8 If he produces a report, obviously the  
9 defense has that report. If he doesn't produce a  
10 report, which is not required -- if he doesn't  
11 produce a report, then I've indicated that the state  
12 would provide the defense with a notice of the  
13 issues of the areas that we believe Mr. Ross will  
14 testify to so that they have something to work from  
15 when they interview him.

16 And I would suggest to the Court that this  
17 is what happens when you call -- when we call what's  
18 called a "cold witness" or a "cold expert" to the  
19 stand. Not every expert is familiar with the facts  
20 of the case. And cases can proceed with an expert  
21 who is called simply to offer information that  
22 assists the jury in making a determination without  
23 that witness knowing anything about that specific  
24 case.

25 And in those cases that witness doesn't

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1 produce a report, but that witness is available for  
2 an interview. So it's not standard, it's not  
3 required, that the witness have a report.

4 With respect to Mr. Ross, I don't know if  
5 he's going to have a report or not. With respect to  
6 the defense witness, I'm in the same position. I  
7 don't know if there is a report or not.

8 But there is no requirement that there be  
9 a report. There is no requirement that says in lieu  
10 of the report you get the state's notes. The  
11 state's obligation is to give the defense full and  
12 fair notice about the area that that expert is going  
13 to testify about so that they can conduct a  
14 meaningful interview. And we absolutely will do  
15 that.

16 THE COURT: Ms. Do, there is a difference  
17 between the disclosure requirements, comparing the  
18 prosecution and the defense in one respect? The way  
19 I read the rules, the defense can consult with an  
20 expert. And if you don't list that expert, then  
21 that still stays -- you know -- being privileged or  
22 within work product.

23 The rule for the prosecution is written  
24 much broader. If there is an expert who's looked at  
25 the case in some fashion and you read 15.1(b)(4),

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1 and it doesn't fit so closely with the type of  
2 expert I think he's contemplated here, it seems to  
3 apply most clearly to testing, comparisons, those  
4 things. But the language does cover all types of  
5 experts, I think.

6 But the state has a broader obligation.  
7 If someone has looked at evidence and has an opinion  
8 and you know it, you have to disclose it whether  
9 there is a report or not. That's the way I see  
10 that. The defense doesn't exactly have that  
11 obligation unless the person is listed as a  
12 witness. And then I think the obligations are the  
13 same.

14 Ms. Do?

15 MS. DO: I absolutely agree with the Court. In  
16 addition to that, we -- I don't know what  
17 Ms. Polk -- I did send Ms. Polk a letter a few weeks  
18 ago indicating to her that our medical examiner was  
19 finishing up his analysis of this case, is going to  
20 write a report, is available to the state for an  
21 interview.

22 So we are absolutely in compliance with  
23 our obligation with respect to trial expert  
24 witnesses.

25 I do agree with the Court's assessment

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1 that the burden on the prosecution is different than  
2 the burden on the defense. But, again, we're back  
3 to -- the issue at heart here is the fact that they  
4 have a witness that they're going to call for trial.

5 And I know that in the notice given to the  
6 defense, the state indicated he was going to testify  
7 to group behavior. In the motion for protective  
8 order, they added additional facts regarding the  
9 proper opinions of this experts.

10 So we have not gotten full and fair notice  
11 of what this expert is going to testify to. So if  
12 Ms. Polk doesn't want to disclose her notes -- we're  
13 not requiring it to be given to us in that form.  
14 We're asking for disclosure of what his opinion,  
15 analysis and conclusion are with respect to the  
16 evidence he's reviewed in this case.

17 THE COURT: I think the discussion here has  
18 removed some bit of confusion that arises with what  
19 15.1(b)(1) encompasses with regard to statements.  
20 And I think that's where the confusion comes in  
21 about what is an expert statement. I really think  
22 (b)(4) predominates.

23 And, Ms. Polk, that's the obligation. And  
24 regardless of whether the expert has written up  
25 something you would call a report, if the expert at

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1 this point has looked at in this case statements,  
2 that would be the evidence of the case. Statements,  
3 predominantly. I would think there might be other  
4 kinds of information, I suppose, certain documents  
5 as well.

6 But if he's seen those and has some kind  
7 of an opinion, what you would call a result, then  
8 that has to be disclosed.

9 And I think the defense is saying they  
10 would rather have that in a report form or have it  
11 in that fashion. But I think the state's obligation  
12 is to provide that information.

13 It isn't through your notes. You don't  
14 have to provide it by divulging notes that are full  
15 of work product. And I agree with the state. I  
16 think the defense agrees too. Separating out work  
17 product from notes of an interview, whether it's an  
18 expert or another type of witness, is extremely  
19 difficult. Just the fact of taking notes reflects  
20 mental impressions just by what's being emphasized  
21 or whatever.

22 But that is the way I read 15.1(4)4. And  
23 I think that information should be turned over.

24 MS. POLK: Your Honor, I agree with that. And  
25 we're not even there yet. The defense was demanding

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1 the notes from conversations that we had in  
2 retaining this expert. And that's all that's  
3 happened at this point.

4 We've retained Mr. Ross. I'll have to  
5 check with my staff to see if he's been provided any  
6 information off the case yet. I don't know the  
7 status. So we have not had an interview with  
8 Mr. Ross where he tells us his impressions about the  
9 case. That's out there. That hasn't even happened  
10 yet.

11 But in the early stages of having  
12 disclosed Mr. Ross, suddenly what the state was  
13 getting was a demand from the defense that they get  
14 our attorneys' notes from the conversations we had  
15 in just trying to identify and retain Mr. Ross.

16 In fairness to the defense, we did notice  
17 Mr. Ross as a witness for this hearing. And I  
18 believe that's why they felt it so necessary to get  
19 that information. But we withdrew that, the use of  
20 Mr. Ross at this hearing.

21 And I suggest at this point now we need to  
22 wait and follow the process, follow the rules. When  
23 we have statements from Mr. Ross, we will certainly  
24 disclose them. But Mr. Ross -- I'm not even sure  
25 he's seen any information about the case yet. I

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1 just don't know what stage we're at.

2 Suddenly the state was put in a posture  
3 where we're trying to defend notes taken by  
4 attorneys in having that initial conversation about  
5 whether or not to retain him. That's what our  
6 motion for protective order was about.

7 And at that time I understood the defense  
8 to -- their possession was that they thought they  
9 were entitled to all those notes from contact with  
10 anybody. They've since much -- they've narrowed  
11 it.

12 I think we're all in agreement. They do  
13 get statements made by this expert. I don't believe  
14 the state has any at this point. But if and when we  
15 get them, we will certainly disclose them.

16 THE COURT: I think Ms. Do has made very clear  
17 that the defense just felt that in light of the very  
18 short time before the hearing, they needed to get  
19 the information in whatever form it was available.  
20 That's not the situation now.

21 But it's not far off, because really, with  
22 the trial set in February, there is a lot of work to  
23 be done.

24 MS. DO: Your Honor?

25 THE COURT: Yes.

15

1 MS. DO: We've been focusing this discussion on  
2 the state's notes. And we did also make a request  
3 the state to have Mr. Ross provide his notes, if  
4 any. And that has not been responded to. And I  
5 know that the Court did not take that up at the  
6 early argument.

7 But we would renew that request again. We  
8 have not yet received a response from the state.

9 THE COURT: And as a listed witness, I think  
10 that's appropriate. If he was not listed, you look  
11 carefully at 15.1(b)(4), it hasn't gotten to the  
12 point of actually constituting a result or opinion,  
13 comparison. Perhaps not.

14 But I think once somebody is listed, then  
15 either side --

16 It applies to both sides, Ms. Polk.

17 I agree you're going to get to look at the  
18 notes that go into that person's work on the case  
19 once that person is listed as a witness, an expert  
20 witness.

21 So I didn't mean to not address that. I  
22 just thought the harder issue was the question of  
23 attorney notes. And I'm just assuming that before  
24 interviews of the experts occur, the other side is  
25 going to have notes, going to have notes.

16

1 I'll still -- the ruling will be much more  
2 concise than it was shaping up before. But I think  
3 I made clear what I believe the interpretation is.

4 The only thing, Ms. Polk and Ms. Do, is  
5 the experts have to do their work and information  
6 has to be exchanged. We just cannot get right up to  
7 the end and then find out that there really was  
8 information disclosed that hadn't been.

9 And these aren't the type of experts,  
10 Ms. Polk, that I think people are contemplating to  
11 be how you phrased it, cold expert, or where you  
12 just have somebody testify without a report and get  
13 information and answer hypotheticals or something.

14 What were you saying?

15 MS. POLK: Well, they might be, Judge. Where  
16 you call a witness who has an area of expertise or  
17 experience that can assist the jury in understanding  
18 a fact in the case.

19 THE COURT: Well, these experts have been  
20 listed and the information needs to be provided.

21 Anything else?

22 MS. POLK: No, Your Honor.

23 MR. LI: No, Your Honor.

24 MS. DO: No, Your Honor.

25 THE COURT: Thank you. Diane will be

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1 contacting you. I'm going to have to look at some  
2 scheduling and see what I think needs to be done.  
3 But the question of getting the sweat lodge  
4 records -- that's something that's come up. I  
5 expect to see something on that quickly.

6 Thank you.

7 (End of partial transcript Also end of court  
8 session this day )  
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1 STATE OF ARIZONA )  
2 ) ss: REPORTER'S CERTIFICATE  
3 COUNTY OF YAVAPAI )

4 I, Mina G. Hunt, do hereby certify that I  
5 am a Certified Reporter within the State of Arizona  
6 and Certified Shorthand Reporter in California.

7 I further certify that these proceedings  
8 were taken in shorthand by me at the time and place  
9 herein set forth, and were thereafter reduced to  
10 typewritten form, and that the foregoing constitutes  
11 a true and correct transcript.

12 I further certify that I am not related  
13 to, employed by, nor of counsel for any of the  
14 parties or attorneys herein, nor otherwise  
15 interested in the result of the within action.

16 In witness whereof, I have affixed my  
17 signature this 8th day of December, 2010.

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19 MINA G. HUNT, AZ CR No. 50619  
20 CA CSR No. 8335  
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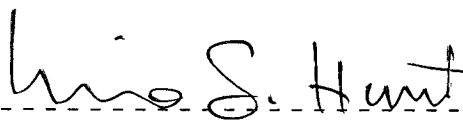
1 STATE OF ARIZONA       )  
2 COUNTY OF YAVAPAI     )       ss:       REPORTER'S CERTIFICATE

3           I, Mina G. Hunt, do hereby certify that I  
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16 signature this 8th day of December, 2010.

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19 MINA G. HUNT, AZ CR No. 50619  
20 CA CSR No. 8335  
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